Supreme Court, U.S.
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In the Supreme Court of the United States

John Rasmussen and Nancy Rasmussen, husband and wife, and their marital community,

Petitioners;

v.

King County, a political subdivision of the State of Washington,

Respondent.

On Petition for Writ of Certiorari to the U.S. Ninth Circuit Court of Appeals, and the U.S. District Court, Western District of Washington

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

In this case King County filed a quiet title action in state court, to determine fee title to real property that was subject to county and private landholder claims of ownership. The private landholder removed to federal court, citing federal question jurisdiction subsumed in the "taking" actions of the county. The federal trial court struck or denied all the federal question issues raised by the private landholder, then proceeded to determine fee title ownership, by creating a new federal property law for transfer of legal title to land, with the assistance of fictitious facts tortuously created to support this new federal law. Upon appeal the Ninth Circuit affirmed this action. **Query: Is it proper for a federal court to create new federal rules for transfer of legal title to real property involving exclusively non-federal lands, to supersede established state law title transfer statutes?**

Parties to the Proceeding

(The caption of the case contains the names of all the parties.)

Statement of the Basis for Jurisdiction

It is the petitioners' contention that the trial court's basis for subject matter jurisdiction was extinguished when the trial court struck or denied all the petitioners' counterclaims (including the railbanking issue, which was the source of federal question jurisdiction, initially), leaving only the state quiet title action remaining for adjudication, which was not a *pendent jurisdiction* claim.

The District Court filed its memorandum Order Granting in Part Plaintiff's [King County] Motions to Strike, Granting Plaintiff's Motion for Summary Judgment, and Granting Plaintiff's Motion to Dismiss on May 25, 2001. The District Court filed its Judgment, granting summary judgment in favor of King County, and quieting title in favor of King County, and declaring King County has the right to quiet enjoyment, and granting the county's motion to dismiss all counterclaims in this action on June 8, 2001. The petitioners-Rasmussen timely filed their Notice of Appeal to the Ninth Circuit Court of Appeals on June 22, 2001.

The Ninth Circuit Court of Appeals affirmed the District Court on August 9, 2002. Rehearing,

and suggestion for *en banc* rehearing, were denied on October 11, 2002. This petition was timely filed by placing it in the U.S. Mails on January 9, 2003, with accompanying certification of service.

The appellate courts, including this court, have jurisdiction to review this case pursuant to 28 U.S.C. § 1291.

Applicable Constitutional Provisions, Statutes, Ordinances, and Regulations Include the Following:

1. 28 U.S.C. § 1441(a); 28 U.S.C. § 1331; 16 U.S.C. § 1247(d); 28 U.S.C. § 1291 (sources of federal jurisdiction relied upon by the trial court for its actions, and the affirmation by the Ninth Circuit).

2. "[A]ny person who has already settled or hereafter may settle on the public lands of the United States, either by pre-emption, or by virtue of the homestead law or any amendments thereto, shall have the right to transfer by warranty, against his or her own acts, any portion of his or her said pre-emption or homestead for church, cemetery, or school purposes, or for the *right of way of railroads* across such pre-emption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to their preemptions or homesteads." Act of March 3, 1873, ch. 266, 17 Stat. 602 (1873) (emphasis

added). (This statute remains, in slightly altered form, at 43 U.S.C. §174.)

3. "**Conveyances and encumbrances to be by deed.** Every conveyance of real estate, or any interest therein *** shall be by deed...". R.C.W. 64.04.010.

4. "**Quitclaim deed—Form and effect.** *** Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance***in fee of all the then existing legal and equitable rights of the grantor *** **but shall not extend to the after acquired title unless words are added expressing such intention**". (emphasis added). R.C.W. 64.04.050.

5. "**Manner of conveyance.** All deeds, conveyances, encumbrances or transfers of any nature and kind executed by any Indian, or in any manner disposing of any land, or interest therein, shall be by deed executed in the same manner as prescribed for the execution of deeds conveying real estate, or any interest therein, except that the same shall in all cases be acknowledged before a judge of a court of record. In taking said acknowledgment, the said judge shall explain to the grantor the contents of said deed or instrument, and the effect of the signing or execution thereof, and so certify the same in the acknowledgment, and before the same shall be admitted to record shall duly examine and

approve the said deed or other instrument". R.C.W. 64.20.020, Enacted Laws 1890, p. 500, §2.

7. 49 USC §10906, and 28 USC §1336(a) and (b) (United States Surface Transportation Board has no subject matter jurisdiction over railroad spur lines, and therefore railbanking of spur lines is illegal; federal court has plenary power to revisit subject matter jurisdiction of a federal agency ruling, despite procedure for appeal of substantive agency ruling).

8. U.S. Constitution; First, Tenth and Fourteenth Amendments:

First Amendment: "...to petition the Government for a redress of grievances."

Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Fourteenth Amendment (Section 1): "...nor shall any State deprive any person of life, liberty, or property, without due process of law...".

Statement of the Case

Bill Hilchkanum was the original homesteader of the Rasmussens' lands in this case. ER, 446. On June 15, 1876 David T. Denny[1] and

[1] Affiant David T. Denny was one of the founders of the Seattle Lake Shore & Eastern Railway

Luke M. Redmond stated under oath that Bill Hilchkanum was an Indian who had abandoned his membership in the Snoqualmie tribe, and "adopted the habits and pursuits of civilized life". ER, 494. The entire chronology of events explaining the homestead efforts of Bill Hilchkanum are found as exhibits to the expert witness Graddon declaration, at ER 446-522. On March 6, 1884 David T. Denny testified by sworn affidavit that "Bill Hilchkanum is an Indian and unable to read or write the English language***That said Indian Bill Hilchkanum relied on this affiant to take care of his said business...". ER, 486. On March 24, 1884 Bill Hilchkanum "made his mark" upon an affidavit, which stated he "is an Indian and unable to read or write the English language and hence depends entirely upon the assistance of his white friends to aid him in transacting his business for him. That one D.T. Denny of Seattle W.T. had the care of his homestead papers for him..." ER, 483. David T. Denny was one of the witnesses to the original Hilchkanum deed in this case. ER, 502. On March 25, 1884 George W. Tibbetts swore by affidavit that he was "well acquainted with Bill Hilchkanum..."

[henceforth "SLS&E"]; *see* "Orphan Road, The Railroad Comes to Seattle, 1853-1911", by Kurt E. Armbruster, Washington State University Press, Pullman, Washington ©1999 by Board of Regents of Washington State University, at p. 122.

and that "...Bill Hilchkanum is an Indian and unable to read or write the English language and that he depended upon other parties to manage his business for him so that said Indian did not understand how to proceed in his homestead proof...". ER, 485. In all documents of record, including the original Hilchkanum deed to SLS&E, Bill Hilchkanum signed his name by "making his mark", which was an "X", rather than a written or printed signature. ER, 476-522. The quitclaim deed from Bill Hilchkanum to SLS&E was signed (by his "mark") and delivered to SLS&E on May 9, 1887. ER, 501-503. Bill Hilchkanum received the United States' fee patent to his homestead lands on July 24, 1888. ER, 505-507.

The above uncontroverted material facts describe the grantor whom the district court in this case found as being competent to limit a grant and to distinguish between an easement and a conveyance of fee simple absolute. ER, 592-597. The district court even found that Bill Hilchkanum was aware of 17 U.S. Stat. 602, and chose the phrase "right of way" out of necessity rather than to create an easement, because Bill Hilchkanum knew the then existing federal law allowed the conveyance of a railroad right of way before he had received his fee patent. ER, 595. The finding was both ridiculous and irrelevant to the real issues at hand, namely, that a federal court cannot subvert state law real property title transfer requirements,

and creatively legislate a new federal real property title transfer law that exists nowhere in federal or state codes.

None of the subsequent deeds originally signed by the Hilchkanums, that affected the Rasmussens' contested real property, (Government Lots 2, 3 and 5), had any "exception" language analyzed by the district court[2]. ER, 514-526. This refutes the district court's finding that the Hilchkanums' later behavior buttressed their intent to convey fee simple title to the SLS&E. ER, 595-506.

Petitioners-Rasmussens presented two expert witnesses to refute the county's claims of fee simple ownership. Stephen J. Graddon testified by declaration under penalty of perjury that the "Ownership Research Report dated September 25, 1999" "...accurately describes the location, nature, and extent of the railroad right of way easements said to have been *originally* located upon the Rasmussen property. The treatment of that railroad

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[2] In a junior quitclaim deed dated March 3, 1909, there was an "exception" clause to a portion of the Rasmussen property, affecting approximately 1% of the right-of-way area. ER, 521. ***But see, Harris v. Ski Park Farms,*** 120 Wn.2d 727, 740, 844 P.2d 1006 (1993) (Washington Supreme Court, in dictum, observed a fee conveyance excepted an easement from the conveyance).

easement is subject to the *abandonment, nature* of easement, current *width* of easement, *actual location* and *scope of usage* issues currently before this court". ER, 435. In Graddon's authenticated "Exhibit 1" at section 5, he described his personal knowledge of King County's rules of interpretation of deed construction and makers' intent to all rights of way whether road or railroad. ER, 454. He described his qualifications as an expert witness for King County. ER, 531. He analyzed specific illustrations of granting clause language with limitations similar to the Hilchkanum deed granting clause limitations, noting they were deemed to be easements, and he specifically applied the King County protocol to the deed analysis of the Hilchkanum deed in this action. ER, 455. He concluded that the "...language of the title, or heading, *("Right of Way Deed")* as well as the embodied language *("In consideration of the benefits and advantages to accrue to us from the location construction and operation of the ...Railway...we do hereby donate grant and convey unto said...Railway Company a right of way...to have and to hold the said premises with the appurtenances...forever.")* certainly and definitively is qualifying language which clearly establishes the intent of the makers to create an easement instrument with absolute rights of reversion upon abandonment by the Railroad Company". ER, 456. The second expert witness,

Roger Hayden, corroborated the nature of the conveyance from Hilchkanum to SLS&E as an easement, rather than a fee simple absolute property right. ER, 124.

Graddon also criticized the county's claim to fee simple title. ER, 524-526. In analyzing the actual alignment of the existing railway track, expert witness Graddon stated "...King County does not have a recorded chain of title link to the originally granted Railroad Right of Way legally described and granted by Settler Hilchkanum". ER, 525.

King County officials commenced a campaign of trespassing, deliberately walking over the Rasmussens' waterfront property without permission. ER, 146. The Rasmussens attempted to redress their grievances with King County for over fifteen months, to no avail. ER, 145. John Rasmussen was accused of threatening to shoot county officials with his shotgun, an accusation he vigorously denied. ER, 150. County officials sought and obtained injunctive relief, using false statements concerning John Rasmussen's actions. ER, 151.

The unrefuted evidence supports the Rasmussens' claim that the rail "corridor" in this action was a "*spur line*". ER, 100-102. The county engaged in railbanking efforts concerning the contested land, through association with Burlington Northern Santa Fe Railroad ("BNSFR") and The Land Conservancy ("TLC"), and an order was

obtained from the United States Surface Transportation Board that the *spur line* in this case was amenable to railbanking. ER, 45-47. The tax write-off for BNSFR was enormous, through the **Arthur Andersen**[3] appraisal of the entire *spur line* area adjacent to Lake Sammamish. ER, 202-270. [**NB: This tax scheme is being repeated throughout the United States, costing legitimate taxpayers, and the federal government, billions in lost tax revenues.**] TLC had been granted whatever title BNSFR had to the *spur line*, prior to any railbanking deliberations of USSTB. ER, 297-328. King County purchased whatever title TLC had to the *spur line*, and now claims it has fee simple absolute title to this *spur line* area, including the area through the Rasmussens' property. ER, 329-362. The Rasmussens claim they should have been given actual notice of any USSTB actions, which is denied by King County. ER, 93. The Rasmussens claim that the county's treatment of the *spur line* as an easement before the USSTB is inconsistent with its claim of fee simple ownership of the contested property in this case. ER, 364-367.

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[3] This court should accept certiorari simply for the pleasure of exposing this Arthur Andersen tax fraud conspiracy.

Arguments Supporting Granting the Writ

The District Court has so far departed from the accepted and usual course of judicial proceedings, and the Ninth Circuit Court of Appeals has sanctioned such a departure, so as to call for an exercise of this Court's supervisory power. This action should either be stayed pending final resolution of these distinctly state issues before the Washington Supreme Court[4], or alternatively this action should be remanded and the purely state issues should be certified to the Washington Supreme Court. In any case, the summary judgment should be reversed.

New federal real property law has now been enacted by the District Court and the Ninth Circuit, by using "certificate of ownership" interchangeably with "fee patent deed" as applied to the Homestead

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[4] There is pending before the Washington court of Appeals, Division I, the sister case to this case, namely *Gerald l. Ray and Kathryn B. Ray, husband and wife, vs. King County, a political subdivision,* King County Superior Court No. 00-2-14946-8 SEA; Division I, Washington Court of Appeals No. 71561-1, where the same or similar issues of Washington real property law shall be determined, and those issues and decision shall probably be in direct conflict with this court's decision.

Act of 1862. There is no such reference to a "certificate of ownership[5]" in the Homestead Act, and even if there were, it could not be used interchangeably with the term "fee patent deed". The law of this case, and now precedential for all Ninth Circuit states, is that it is now unnecessary for a grantor to receive a deed from the federal government before the grantor conveys fee simple title to a railroad—a new, judicially-enacted federal real property law that shall tear the entire fabric of state real property law, as well as recognized principles of title examination throughout the Ninth Circuit.

In finding the Hilchkanum deed granted a right "over" the land for tree-cutting purposes, when no such reference to "over" the land exists in the

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[5] On March 29, 1884, the Land Office at Olympia issued Bill Hilchkanum a "Final Certificate" for Lots 1, 2, 3 and 5. The express language stated "on presentation of this Certificate to the Commissioner of the General Land Office, the said Bill Hilchkanum shall be entitled to a Patent for the Tract of Land above described". ER 475. The fee patent deed was not executed and delivered until 1888. ER 474, 505. Hilchkanum did not have fee simple title to his homestead in 1887, when he conveyed a railroad right of way easement pursuant to the Act of March 3, 1873, ch. 226, 17 Stat. 602 (1873).

Hilchkanum deed, an untenable presumption was created that Hilchkanum must have known the difference between an easement and a fee simple interest. The untenable presumption must fail with the evaporation of the imaginary word that was concocted and quoted as if it actually existed in the Hilchkanum deed. This is not misapplication of a properly stated rule of law, it is the creation of a legal fiction to justify aggressive judicial legislation with no basis in fact or law.

Constitutional principles of the right to redress of grievances have been violated, where the federal judges refused to examine ordinances cited in the Rasmussens' briefing that clearly required King County to "afford citizens fair notice and due process". The Ninth Circuit incorrectly concluded the federal district court had no authority to examine subject matter jurisdiction of an administrative agency [USSTB] to issue administrative orders affecting lands that were clearly not subject to the rule-making authority of such federal agency, ignoring the elementary rule that subject matter jurisdiction can be challenged at any stage of litigation.

Since there cannot be a conclusion the underlying facts are undisputed, and since the reasonable inferences all support denial of summary judgment in this action, this case should be remanded, and the summary judgment order should be reversed.

The railroad right of way conveyance from Hilchkanum could not include fee simple estate conveyance, because Hilchkanum did not have a fee simple estate to transfer at the time of the conveyance. R.C.W. 64.04.010 states, in pertinent part:

"**Conveyances and encumbrances to be by deed.** Every conveyance of real estate, or any interest therein *** shall be by deed…".

The above statute, enacted in 1929, was based on the Washington Territorial Laws which were the same as the codification here, and those territorial laws were effective at the time Hilchkanum proved up his homestead in 1884, and received his fee patent deed in 1888. *See*, R.C.W. 64.04.010, Legislative History. The well-recognized rule in Washington is that real property can be conveyed *only by deed* under this statute, and the territorial laws described in the Statute of Deeds. *Erickson v. Walheim*, 52 Wn.2d 15, 319 P.2d 1102 (1958). In 1884 Bill Hilchkanum did not receive a deed, even if he had completed all necessary requirements for proving his homestead under the Homestead Act of 1862. He could not have conveyed a fee simple title in 1887, because he didn't hold legal title by fee patent deed until 1888.

Notwithstanding this well-settled principle of real property law, uniform throughout the states controlled by Ninth Circuit Court of Appeals

precedent, the federal judges in this case have legislated new federal real property law, and have now determined that **vested fee title** to real property that had **not yet been conveyed by fee patent deed** to the homesteader could have been transferred by the homesteader to the railroads during those years before the homesteader had received vested fee title[6].

Because there was no after-acquired title clause to save the conveyance when Hilchkanum subsequently received his fee patent deed in 1888, the conveyance of a railroad right of way easement was extinguished in 1888. R.C.W. 64.04.050 states, in pertinent part:

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[6] "...[Hilchkanum] did not need to act within the restrictions of the Act of March 3, 1873 to alienate his property nor did he need to include an after-acquired property clause in his conveyances; he had title free and clear and could convey to the Railway whatever he wished.

Although Hilchkanum did not obtain his patent deed until 1888, the Rasmussens cite no authority suggesting that the certificate of ownership did not perfect his title, and their own expert opined that Hilchkanum obtained "unqualified and perfect fee simple ownership" in 1884. Graddon Decl. Ex. 1, §1 at 2." Ninth Circuit Opinion, at 11622.

"**Quitclaim deed—Form and effect.** *** Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance***in fee of all the then existing legal and equitable rights of the grantor *** **but shall not extend to the after acquired title unless words are added expressing such intention**". (emphasis added).

The Hilchkanum conveyance provided no warranties, and even though it did not comport with the specific requirements of the then existing Statute of Deeds, the closest conveyance instrument format was the quitclaim deed described in this statute. **But the railroad failed to include an after acquired title clause in the Hilchkanum conveyance document,** and Hilchkanum could not transfer what he presently did not have in 1887—a railroad right of way easement. The federal homestead law made exception for this, by enactment of the Act of March 3, 1873, ch. 226, 17 Stat. 602 (1873). This allowed Hilchkanum to convey a railroad right of way, in 1887, without affecting his homestead rights. But the federal law did not purport to supplant the Washington Statute of Deeds, because state law controls the conveyance of legal title to land in Washington. R.C.W. 64.04.010 *et seq.*

Thus, the state ***doctrine of after acquired title*** remained intact after enactment of the 1873 homestead laws, and Hilchkanum did not convey his *future interest* in his land, so when he received a

fee patent deed from the federal government in 1888 he did not then convey any of this fee simple interest to the railroad (the federal fee patent deed did not except any portion of the real property for railroad right of way purposes). R.C.W. 64.04.050; *Brenner v. Brenner Oyster Co.,* 48 Wn.2d 264, 292 P.2d 1052 (1956).

Viewing the facts of this case most favorably to the Rasmussens, and accepting as verities the reasonable inferences from those facts, it is clear King County should not be granted summary judgment. *Orin v. Barclay,* 272 F.3d 1207 (9th Cir. 2001). There is an obvious need to examine all the Native American-grantor, railroad-grantee deeds of the late 1800's, including Hilchkanum's deed, to determine if the habendum clauses were ever modified, as were the habendum clauses of deeds signed by white men. Even the Washington Legislature, in 1890, recognized the propensity of the railroads to take advantage of Native Americans such as Bill Hilchkanum:

> "**Manner of conveyance.** All deeds, conveyances, encumbrances or transfers of any nature and kind executed by any Indian, or in any manner disposing of any land, or interest therein, shall be by deed executed in the same manner as prescribed for the execution of deeds conveying real estate, or any interest therein, **except that the same**

shall in all cases be acknowledged before a judge of a court of record. In taking said acknowledgment, the said judge shall explain to the grantor the contents of said deed or instrument, and the effect of the signing or execution thereof, and so certify the same in the acknowledgment, and before the same shall be admitted to record shall duly examine and approve the said deed or other instrument". R.C.W. 64.20.020, Enacted Laws 1890, p. 500, §2.

By inspection of the Hilchkanum deed there is no evidence he was afforded the due process of law protections enacted to prevent the type of discriminatory practices which lead to untenable inferences in construing railroad right of way conveyances. This court should not add to this insult by allowing the lower federal courts' spin on the extrinsic evidence; namely that Bill Hilchkanum could decipher a railroad right of way conveyance, and could distinguish between a grant of fee simple interest and a grant of a railroad easement. Such a conclusion would only promote the injustices suffered by illiterate Native Americans such as Bill Hilchkanum, an ironic twist resulting from the District Court's refusal to concede Bill Hilchkanum was isolated in his dealings with the railroad, and was at the railroad's mercy in the choice of conveyance language for his right of way conveyance.

In reviewing the trial court's summary judgment *de novo, Devereaux v. Abbey,* 263 F.3d 1070 (9th Cir. 2001), this court should adopt the general rule of *Brown v. State,* 130 Wn.2d 430, 924 P.2d 908 (1996), as it applies to the Hilchkanum conveyance, and similar conveyances found in *Veach v. Culp,* 599 P.2d 526 (Wash. 1979); *King County v. Squire Inv. Co.,* 801 P.2d 1022 (Wash. Ct. App. 1990); and *Northlake Marine Works, Inc. v. City of Seattle,* 857 P.2d 283 (Wash. Ct. App. 1993):

> "...Unlike *Swan, Veach,* and *Roeder,* where 'right of way' was used in the granting or habendum clauses to qualify or limit the interest granted, 'right of way' in the deeds at issue here appears in either the legal description of the property conveyed or in the portion of the deeds describing Milwaukee's obligations with respect to the property...". *Brown, supra,* at 441.

The *Brown* court noted the distinction between qualifying or limiting the granting clause and simply using descriptive language in the legal description or in the description of the grantee's obligations. In every Washington railroad case where there has been a grant of a "right of way" in the granting clause, with or without qualifying language or limiting language in the habendum clause, the Washington courts have held the right of way conveyance is an easement. Even *Brown* notes

this distinction. The District Court and the Ninth Circuit have done great violence to 100 years of well-settled rules of railroad right of way deed construction, by focusing on the habendum clauses of white men's deeds, to extrapolate a distinction without a difference between those white men's deeds and the Hilchkanum deed. This court should grant this petition and reverse the trial court's summary judgment.

The specific recitation of King County Ordinance 6531 §1, 1983; Ordinance 2165 §1, 1974, were ignored by the lower federal courts and the petitioners have serious constitutional claims for redress of grievances. Without any live testimony, with no cross examination, with no confrontation of accusers, petitioner John Rasmussen was essentially tried and convicted of "threatening county employees who entered the railroad right of way bisecting his land". *Opinion,* at 11634. This, despite John Rasmussen's consistent denial of any such misconduct, and despite his persistent requests for an evidentiary hearing, all to no avail. See *Monell v. Dep't of Soc. Serv.,* 436 U.S. 658 (1978).

The unrefuted fact is that the rail line in this case was a spur line, and that the federal law does not allow the U.S.S.T.B. to exercise jurisdiction over a spur line. There is no evidence before the federal courts to indicate the rail line in this action was a "railway corridor" (*Opinion,* at 11615),

instead of a spur line. The criteria for a spur line are clear and the facts are irrefutable that Burlington Northern Santa Fe Railway had abandoned a spur line in 1996. ER, 100-102. Federal law prohibits the administrative agency, the U.S.S.T.B., from exercising any jurisdiction over a spur line. 49 USC §10906. This court has plenary power to determine if there has been a failure of subject matter jurisdiction, at any stage of the litigation:

> "...The rules of civil procedure create powerful exemptions for subject-matter voidness, namely, that an absence of subject-matter jurisdiction may be raised at any point in the proceeding and that a judgment entered by a district court without subject-matter jurisdiction is inherently void and cannot be validated by the passage of time. *See* Minn. R. Civ. P. 12.08(c); *Peterson v. Eishen*, 512 N.W.2d 338, 340 (Minn. 1994); *Lange v. Johnson*, 295 Minn. 320, 204 N.W.2d 205 (1973); *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489 (Minn. App. 1995)." *Bode vs. Minn. Dept. of Natural Resources,* 594 N.W.2d 257, 261 (1999).

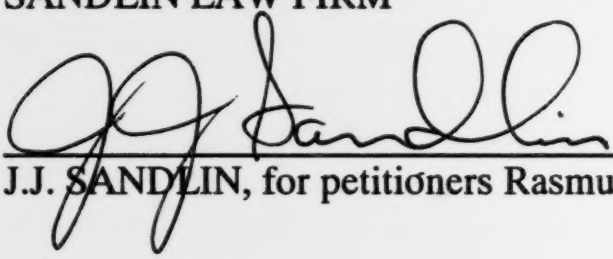
CONCLUSION

This court should grant this petition and reverse the lower federal courts, and remand this

action or alternatively stay the proceedings until the Washington Supreme Court has provided direction regarding the distinctly state law issues of real property title laws. Without this Court's intervention the doctrine of after-acquired property has been destroyed, and the western states no longer can exercise legitimate control over real property title transfer issues.

Respectfully submitted this 9th day of January, 2003.

SANDLIN LAW FIRM



J.J. SANDLIN, for petitioners Rasmussen

APPENDIX

(see following pages A-1 through A-37, Ninth Circuit Opinion in this case, with citation to District Court opinion)

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KING COUNTY, a political subdivision of the State of Washington,
Plaintiff-counter-defendant-Appellee,

v.

JOHN RASMUSSEN; NANCY RASMUSSEN, husband and wife, and their marital community,
Defendants-counterclaimants-Appellants.

Appeal from the United States District Court for the Western District of Washington
Barbara J. Rothstein, Chief District Judge, Presiding

Argued and Submitted
June 13, 2002—Seattle, Washington

Filed August 9, 2002

Before: Betty Binns Fletcher and Ronald M. Gould,
Circuit Judges, and Mary H. Murguia, District Judge.1

Opinion by Judge B. Fletcher

1The Honorable Mary H. Murguia, United States District Court Judge for the District of Arizona, sitting by designation.

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COUNSEL

J. Jarrette Sandlin, Sandlin Law Firm, Zillah, Washington, for the defendants-counter-plaintiffs-appellants.

Howard P. Schneiderman and Scott Johnson, King County Prosecuting Attorney's Office, Seattle, Washington, for the plaintiff-counter-defendant-appellee.

OPINION

B. FLETCHER, Circuit Judge:

This case arises from a dispute over a 100-foot-wide strip of land running along a portion of the eastern shore of Lake Sammamish in King County, Washington, that was formerly used as part of a railway corridor. King County filed suit against the Rasmussens to quiet title over this strip of land, which bisects the Rasmussens' property, and to obtain a declaratory judgment that it is entitled to quiet enjoyment of the strip.

King County claims it owns a fee simple estate in the strip. The Rasmussens, in turn, claim that their predecessors in interest granted only an easement over the strip and that the rights in the easement have reverted to the Rasmussens so that they now have fee simple title to the strip. The district court granted summary judgment in favor of King County and dismissed the Rasmussens' counterclaims. Because we conclude that no genuine issues of material fact exist for trial and that King County holds the strip in fee simple, we affirm.

I.

Factual and Procedural Background

In 1876, homesteaders Bill Hilchkanum and Mary Hilchkanum claimed property along the eastern shore of Lake Sammamish in King County, Washington. They received their final ownership certificate in 1884 and their fee patent in 1888. On May 9, 1887, the Hilchkanums conveyed an interest in the strip to the Seattle Lake Shore and Eastern Railway Company ("the Railway"). The text of the "Right of Way Deed" is as follows:

In consideration of the benefits and advantages to accrue to us from the location construction and operation of the Seattle Lake Shore and Eastern Railway in the County of King in Washington Territory, we do hereby donate grant and convey unto said Seattle Lake Shore and Eastern Railway Company a right of way one hundred (100) feet in width through our lands in said County described as follows to wit

Lots one (1) two (2) and three (3) in section six (6) township 24 North of Range six (6) East.

Such right of way strip to be fifty (50) feet in width on each side of the center line of the railway track as located across our said lands by the Engineer of said railway company which location is described as follows to wit [legal description in metes and bounds].

And the said Seattle Lake Shore and Eastern Railway Company shall have the right to go upon the land adjacent to said line for a distance of two hundred (200) feet on each side thereof and cut down all
trees dangerous to the operation of said road.

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To have and to hold the said premises with the appurtenances unto the said party of the second part and to its successors and assigns forever.

The deed was handwritten by a notary public.

Mary Hilchkanum later conveyed lots 1 and 3 of the homestead property to her husband by quitclaim deed. The conveyance is "less (3) acres right of way of Rail Road." Bill Hilchkanum then conveyed lot 1 to Chris Nelson "less three
(3) acres heretofore conveyed to the Seattle and International Railway for right of way purposes." The deed by which the Hilchkanums conveyed lot 2 of their homestead property did not contain an exception for the railroad right of way. The Rasmussens claim that the right of way bisects portions of lots 2, 3, and 5.2

The Railway, and its successor Burlington Northern, built a track on the strip of land and used the track regularly for rail service until approximately 1996. In 1997, Burlington Northern sold its railway corridor, including the Hilchkanum strip,
to The Land Conservancy of Seattle and King County ("TLC").

On June 11, 1997, TLC petitioned the United States Surface Transportation Board ("STB") to abandon use of the corridor for rail service under the National Trail System Act, 16 U.S.C. § 1247(d) ("Rails to Trails Act"). The STB approved interim trail use of the corridor — called railbanking — by King County and issued a Notice of Interim Trail Use. The County then purchased the corridor from the TLC and **2**To the extent a portion of the right of way bisects lot 5, that portion is not at issue in this quiet title action. King County bases its claim on the Hilchkanum deed conveying a right of way bisecting lots 1, 2, and 3 to the Railway. The County presented no deed conveying a right of way across lot 5 to the Railway.

obtained title to the right of way carved from the Hilchkanum property.**3**

The Rasmussens oppose King County's efforts to railbank the right of way and claim that King County has no right to use the right of way as a trail because the Railway and its successors held only an easement for railroad purposes. As a result, King County brought this action in state court to quiet title and to obtain a declaration of its rights in the strip. The Rasmussens removed the action to

federal court and counterclaimed with allegations that King County violated their First, Second, Fifth, and Fourteenth Amendment rights and violated 16 U.S.C. § 1267(d), 42 U.S.C. § 1983, 28 U.S.C. § 1358, and Article 1, Section 16 of the Washington state constitution.

King County moved for summary judgment on its claim to the property and moved to dismiss the Rasmussens' counterclaims for failure to state a claim and for lack of subject matter jurisdiction. In response to these motions, the Rasmussens filed two over-length briefs and a declaration from Mr. Rasmussen containing several additional pages of legal argument. King County filed its reply and moved to strike the overlength portions of the Rasmussens' briefs and the legal arguments in Mr. Rasmussen's declaration. They also moved to strike inadmissible evidence from the briefs and the declaration. The Rasmussens filed a brief in response to King County's motion to strike as well as a separate surrebuttal brief.
King County moved to strike the surrebuttal brief. 3The Rasmussens contend that King County has not provided evidence that it has an interest in a significant portion of the strip of land bisecting the Rasmussens' property. They claim that the only evidence provided by

the County is a title insurance document that refers solely to the portion of the strip on Government Lot 3; only 3% of the subject strip is on Government Lot 3. However, King County has also provided the quitclaim deed by which TLC transferred its interest to King County. This deed indicates that the portion of the strip on Government Lot 2 was also conveyed; the Rasmussens assert that 96% of the strip lies on Government Lot 2. Thus, King County has submitted undisputed evidence that it has an interest in the subject property.

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In a published opinion, the district court struck the overlength portions of the Rasmussens' response brief as well as the legal arguments in Mr. Rasmussen's declaration. *See King County v. Rasmussen*, 143 F. Supp. 2d 1225, 1227 (W.D. Wash. 2001). It also struck a paragraph in the response brief that indicated that Bill Hilchkanum was a Native American and was illiterate; the Rasmussens cited no evidence in support of this assertion in their brief to the district court. *Id.* At 1227-28. The district court also agreed to strike the surrebuttal brief. *Id.* at 1228. Finally, it granted King County's motion for summary judgment and

dismissed the counterclaims. *Id.* at 1231. The Rasmussens appeal.

II.

Jurisdiction

The district court had jurisdiction over this removal action if King County could have brought the case in federal court in the first place. 28 U.S.C. § 1441(a). King County could have brought this action in federal court initially because the district court would have had federal question jurisdiction pursuant to 28 U.S.C. § 1331. King County's complaint included an allegation that it had a legal right to the strip of land in question even if the original deed conveyed only an easement. King County relied on 16 U.S.C. § 1247(d) as the source of this right. Thus, there was a federal question on the face of the well-pleaded complaint. *See Patenaude v. Equitable Life Assurance Soc'y of United States*, 290 F.3d 1020, 1023 (9th Cir. 2002) ("The presence or absence of federal question jurisdiction is governed by the well-pleaded complaint rule . . . ." (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987)) (internal quotation marks omitted)).

This court has appellate jurisdiction over the district court's summary judgment pursuant to 28 U.S.C. § 1291.

III.

Motions to Strike

The Rasmussens argue that we should consider materials struck by the court below. The district court struck the overlength portions of the Rasmussens' briefs in response to King County's motions for summary judgment and to dismiss the counterclaims. It also struck legal arguments contained in John Rasmussen's declaration as well as the Rasmussens' surrebuttal brief.

The district court struck these materials on the basis of Western District of Washington Local Civil Rule 7, which limits the length of summary judgment briefs to twenty-four pages, limits the length of briefs relating to other motions to eight pages, and makes no allowance for surrebuttal briefs. Parties may file over-length briefs if they obtain prior permission from the court. The Rasmussens violated this rule by filing two thirty-four-page briefs without obtaining prior permission.4 Mr. Rasmussen's declaration

added further briefing well beyond the twenty-four-page limit. Declarations, which are supposed to "set forth facts as would be admissible in evidence," should not be used to make an end-run around the page limitations of Rule 7 by including legal arguments outside of the briefs. Fed. R. Civ. P. 56(e). As for the surrebuttal brief, the Rasmussens claim that it merely contained a response to the motion to strike. This is not so. It contains
legal arguments on the motion to dismiss the counterclaims.
The Rasmussens filed a separate response to the County's motion to strike, which the district court considered. Thus, the district court acted properly in granting King County's motions to strike.

4The Rasmussens claim that their failure to obtain prior approval to file over-length briefs was due to a miscommunication with the district court's law clerk. However, Rule 7 unambiguously requires prior approval to file briefs exceeding the page limitations set forth in the rule.

For the most part, however, the fact that this material has been struck will not affect our review. The final pages of the summary

judgment response brief do not contain separate legal arguments that are waived because they were not raised in the first twenty-four pages of the brief. Instead, they contain comparisons between the facts of this case and the facts of a Washington Court of Appeals case dealing with a railroad right of way. We must consider the effect of any case relevant to the arguments raised, regardless of whether the Rasmussens briefed the particular case.

As for the counterclaims, the only claims not addressed in the first twenty-four pages of the brief opposing Rule 12(b) dismissal are the Rasmussens' takings claims. However, the district court did not consider these claims waived and instead dismissed them for failure to state a claim. *Rasmussen*, 143 F. Supp. 2d at 1231 (disposing of Fifth Amendment and state constitutional takings claims). Thus, we will address all of the Rasmussens' counterclaims.

IV.

Summary Judgment

A. Standard of Review

A grant of summary judgment is reviewed *de novo*. *Devereaux v. Abbey*, 263 F.3d 1070,

1074 (9th Cir. 2001). This court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* All reasonable inferences from the evidence must be drawn in favor of the nonmoving party. *Orin v. Barclay*, 272 F.3d 1207 (9th Cir. 2001).

B. Validity of Conveyance Prior to Obtaining Fee Patent

The Rasmussens claim that Bill Hilchkanum did not have the power to convey anything more than an easement to the Railway because he had not perfected his title to the homestead when he made the conveyance in 1887. Under the Act of March 3, 1873, ch. 266, 17 Stat. 602 (1873),**5** a homesteader could convey a right of way to a railroad before perfecting his title. The use of the term "right of way" in the statute may have limited a homesteader to conveying only an easement, not a fee simple, to a railroad.

However, we need not answer this question to decide this case because Bill Hilchkanum perfected his title to the homestead property

in 1884, three years before he conveyed the interest in the strip of land to the Railway in 1887. He entered the subject property in 1876 and took up residence there. The Homestead Act of 1862 provided that he could receive a certificate or patent at the expiration of five years from the date of entry if he provided proof that he had resided or cultivated the land for these five years, that he had not alienated any of the land, and that he had borne true allegiance to the United States. *See* Homestead Act, ch. 75, 12 Stat. 392 (1862). Bill Hilchkanum submitted the necessary proof and obtained his certificate of ownership in 1884. Since he had fulfilled all the necessary conditions of ownership, his title was perfected in 5The Act provides that:

[A]ny person who has already settled or hereafter may settle on the public lands of the United States, either by pre-emption, or by virtue of the homestead law or any amendments thereto, shall have the right to transfer by warranty, against his or her own acts, any portion of his or her said pre-emption or homestead for church, cemetery, or school purposes, or for the *right of way of railroads* across such pre-emption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and prefect the title to their preemptions or homesteads. Act of March 3, 1873, ch. 266, 17 Stat. 602 (1873) (emphasis

added). This statute remains on the books, in slightly altered form, at 43 U.S.C. §174.

1884. As a result, he did not need to act within the restrictions of the Act of March 3, 1873 to alienate his property nor did he need to include an after-acquired property clause in his conveyances; he had title free and clear and could convey to the Railway whatever he wished.

Although Hilchkanum did not obtain his patent deed until 1888, the Rasmussens cite no authority suggesting that the certificate of ownership did not perfect his title, and their own expert opined that Hilchkanum obtained "unqualified and perfect fee simple ownership" in 1884. Graddon Decl. Ex. 1, §1 at 2. We affirm the district court's conclusion that there are no genuine issues of fact as to whether Hilchkanum had the power to convey a fee simple interest to the Railway in 1887.

C. Easement or Fee Simple

King County claims that under Washington state law the Hilchkanum deed conveyed a fee simple estate in the strip of land to the Railway. The Rasmussens argue that, even if Hilchkanum had the power to convey a fee

simple estate to the Railway, he intended to convey only an easement. The district court agreed with King County, as do we.

[1] A conveyance of a right of way to a railroad may be in fee simple, or it may be an easement. *Veach v. Culp*, 599 P.2d 526, 527 (Wash. 1979). The intent of the parties is of paramount importance in determining what interest the deed conveyed. *Brown v. State*, 924 P.2d 908, 911 (Wash. 1996). It has been said that it is a factual question to determine the intent of the parties. *Veach*, 599 P.2d at 527. But the intent of parties to a deed as well as the legal consequences of that intent are in reality mixed questions of law and fact: legal rules of deed interpretation determine how the underlying facts reflect the intent of the parties. *See Brown*, 924 P.2d at 912 (determining intent from undisputed underlying facts on summary judgment).
To ascertain the intent of the parties, one must look to the language of the deed as well as the circumstances sur-

rounding the deed's execution and the subsequent conduct of the parties.**6** *Id.* However, the parties must "clearly indicate" an intent to make a conveyance conditional. *King County v. Hanson Inv. Co.*, 208 P.2d

113, 119 (1949) (cited in *Brown*, 924 P.2d at 912).

The Washington Supreme Court provided its most recent guidance on this issue in *Brown*.[7] The *Brown* court identified various factors to consider in determining whether a deed conveyed a fee simple or an easement:

> [W]e have relied on the following factors: (1) whether the deed conveyed a strip of land and did not contain additional language relating to the use or purpose to which the land was to be put, or in other
> ways limiting the estate conveyed; (2) whether the deed conveyed a strip of land and limited its use to a specific purpose; (3) whether the deed conveyed a right of way over a tract of land, rather than a strip thereof; (4) whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land; (5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor; (6) whether the consideration expressed was substantial or nominal;[8] (7) whether the conveyance did or

[6]A finding of ambiguity in the language of the deed is not required to consider extrinsic evidence of the surrounding circumstances and the subsequent conduct of the parties.

Brown, 924 P.2d at 912; *Roeder Co. v. K&E Moving & Storage Co.*, 4 P.3d 839, 841 (Wash. Ct. App. 2000).

7The *Brown* court examined deeds created from 1906 to 1910.

8The Washington courts in recent years have not given much weight to the amount of consideration in determining the intent of the parties, particularly if the record does not establish the consideration typically paid for easements as opposed to fee simple estates. For example, the *Brown* court did not give this factor much weight because it could not be ascertained from the record whether the consideration paid for the conveyances represented the value of an easement or a fee simple. *Brown*, 924 P.2d at 914.

Likewise, in *Roeder*, 4 P.3d at 842, the Washington Court of Appeals noted that the fact that nominal consideration was paid did not reveal much because railroads paid significant amounts for both easements and fee simple purchases. In this case, the Hilchkanums received no monetary consideration for the conveyance to the railroad. However, like the nominal consideration in *Roeder*, the lack of monetary consideration here reveals little about the Hilchkanums' intent. Both an easement and a fee simple would have had monetary value, but the Hilchkanums declined to require any payment.

did not contain a habendum clause, and many other considerations. *Brown*, 924 P.2d at 912.

The *Brown* court further explained that whether the parties to a railroad right of way deed used a statutory form deed is a significant factor in determining their intent. *Brown*, 924 P.2d at 912; *see Roeder Co. v. K&E Moving & Storage Co.*, 4 P.3d 839, 841 (Wash. Ct. App. 2000). The court ruled that "where the original parties utilized the statutory warranty form deed and the granting clauses convey definite strips of land, we must find that the grantors intended to convey fee simple title unless additional language in the deeds clearly and expressly limits or qualifies the interest conveyed."**9** *Brown*, 924 P.2d at 912.

In this case, however, the Hilchkanum deed did not follow the statutory warranty form. The statutory form is as follows:

The grantor (here insert the name or names and place of residence) for and in consideration of (here insert consideration), in hand paid, convey and warrant to (here insert the grantee's name) the following

9WashingtonRevised Code § 64.04.030 states that every deed that follows the statutory warranty deed form "shall be deemed and held a conveyance in fee simple to the grantee, his heirs, and assignes . . . ." This rule originated in 1886. *Roeder*, 4 P.3d at 841 n.8.

described real estate (here insert description), situated in the county of _____, state of Washington.
Laws of 1886, §3, pp. 177-78. The Hilchkanum deed used a slightly different form:

In consideration of (here insert consideration), grantor (here insert name of grantor) does hereby donate grant and convey unto grantee (here insert name of grantee) the following described right of way (here insert description).

As a result, the Hilchkanum deed does not give rise to the presumption that the deed conveyed a fee simple. *See Roeder*, 4
P.3d at 843; *Veach*, 599 P.2d at 527 (no presumption that quitclaim deed conveyed fee simple). A failure to use the statutory warranty deed form, however, does not

necessarily mean that the parties did not intend to convey a fee simple. The court must consider whether other factors indicate that the parties intended a fee simple.

Another factor on which the *Brown* court focused was if and how the deed uses the term "right of way." The court noted that use of the term in the granting clause as a limitation or to specify the purpose of the grant generally creates only an easement. *Brown*, 924 P.2d at 913. The term "right of way," however, can have two purposes: "(1) to qualify or limit the interest granted in a deed to the right to pass over a tract of land (an easement), or (2) to describe the strip of land being conveyed to a railroad for the purpose of constructing a railway." *Id.* at 914.

In *Brown*, the term "right of way" appeared only in each deed's legal description or in the description of the railroad's obligations, instead of in the granting or habendum clauses. The court concluded that "used in this manner, 'right of way' merely describes a strip of land acquired for rail lines." *Brown*, 924 P.2d at 914. Since the term did not qualify or

limit the interest expressly conveyed in the granting and habendum clauses of the deeds at issue, the court concluded it did not indicate an intent to grant an easement only.**10**

[2] Here the term "right of way" appears in the granting clause as well as in the legal description.**11** In this sense, the Hilchkanum deed suggests a possible intent to create only an easement in a way the deeds at issue in *Brown* did not. However, neither the granting nor the habendum clauses contains language clearly limiting the use of the land to a specific purpose.

In virtually all cases where Washington courts have found only an easement, the granting or the habendum clauses contained such language. *See Swan v. O'Leary*, 225 P.2d 199, 199 (Wash. 1950) (granting premises "for the purpose of a Railroad right-of-way"); *Morsbach v. Thurston County*, 278 P. 686, 687 (Wash. 1929) (conveying a "right of way for the construction of said company's railroad"); *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co.*, 111 P. 578 (Wash. 1910) (holding that deed providing "to have and to hold the said premises . . . for railway purposes, but if it should cease to be used for a railway the said premises shall revert to said grantors" granted easement); *Reichenbach v.*

Washington Short Line Ry. Co., 38 P. 1126 (Wash. 1894) (construing deed which provided "so long as the same shall be used for the operation of a railroad" as an easement); *King County v. Squire Inv. Co.*, 801 P.2d 1022, 1022 (Wash. Ct. App. 1990) (granting premises to railroad "so long as said land is used as a right-of-way by said railway Company, Expressly reserving to said grantors their heirs and assigns all their riparian rights

10In a previous case, the Washington Supreme Court had held that the legal description of the interest conveyed is part of the granting clause. *Veach*, 599 P.2d at 527. But *Brown* distinguished the language used in the legal description from the language used in the granting clause. *Brown*, 924 P.2d at 914.

11The Hilchkanum deed is also captioned as a "Right of Way Deed." However, the *Brown* court rejected the contention that use of the term "right of way" in the caption would preclude a holding that a deed conveyed a fee simple interest. *Brown*, 924 P.2d at 915.

. . . ."). Without such additional language, the use of the term "right of way" merely "begs the question" since a railroad could own a

right of way either as an easement or in fee. *Brown*, 924 P.2d at 914.

[3] The Hilchkanum deed contained precatory language indicating that the parties expected that the right of way would be used to construct and operate a railroad, but it did not actually condition the conveyance on such use.**12** *Brown*, 924 P.2d at 912-13. Also, in *Brown*, the court noted that identifying the general purpose of a conveyance, i.e., for railroad
purposes, is not helpful in discerning intent because it does not clarify whether the right of way is an easement or a fee. *Id.* at 913.

One Washington case, *Veach*, supports the Rasmussens' contention that the mere use of the term "right of way" in the granting clause of the Hilchkanum deed, without additional language conditioning the use of the interest, creates an easement. 599 P.2d at 527. In *Veach*, the 1901 deed stated:

The said party of the first part, for and in consideration of the sum of Two Hundred and Twenty-five Dollars, . . . do by these presents remise, release, and forever quit claim unto said party of the second part, and to its assigns, all that certain lot, piece or parcel of land situated in Whatcom County . . . to-wit: "*A right of way* one hundred feet wide, being

fifty feet on each side of the center line of the B.B. & Easter R.R. . . . . To have and to hold, all and singular, said premises, together with the appurtenances unto the

12The deed provided: "*In consideration of the benefits and advantages to accrue to us from the location construction and operation of the SeattleLake Shore and Eastern Railway* in the County of King in Washington Territory, we do hereby donate grant and convey unto said Seattle Lake Shore and Eastern Railway Company a right of way one hundred (100) feet in width through our lands . . . ." DeGoojer Decl. Ex. 1 (emphasis added).

said party of the second part, and to its assigns forever." *Id.* Like the Hilchkanum deed, the language in the *Veach* deed did not expressly limit the use to a particular purpose. However, the district court distinguished *Veach* on the basis of other language in the Hilchkanum deed and extrinsic evidence indicating an intent to convey a fee simple estate, neither of which was present in *Veach*. *Rasmussen*, 143 F. Supp. 2d at 1230 n.4.

[4] First, the district court compared the Hilchkanum deed's language granting an

interest in the strip of land with its language granting the Railway the right to enter the adjacent land to cut trees:

The deed grants a "strip" of land described in metes and bounds rather than merely a right "over" the land (as it does with the tree-cutting grant). The deed uses the word "convey" when granting the strip, which is associated with fee transfers (notably, "convey" is absent in the tree-cutting grant). *See Hanson*, 208 P.2d at 119. *Id.* We agree with the district court that these factors indicate that Hilchkanum intended to convey a fee simple interest in the strip of land described. Furthermore, the fact that he explicitly limited the purpose of the Railway's right to enter the adjacent land demonstrates that he was aware of the distinction between an easement and a fee simple conveyance.**13**

13The Rasmussens provided evidence to the district court that Hilchkanum could not read or write the English language, suggesting that he was not aware of the wording in the deed and its effect. While the district court struck this argument from their response brief, the evidence itself was not struck. We have considered the evidence since it is part of the district court record. Nevertheless, the evidence indicates that Hilchkanum relied on

friends in transacting his business. With the help of his friends, he was able to comply with the Homestead Act and make numerous conveyances of property. There is no evidence that his friends did not assist him with the transaction with the Railway such that he understood the deed's language and could reflect his intent therein.

[5] The district court also looked to the behavior of the parties after the execution of the deed to the Railway, which bolsters the conclusion that the deed conveyed the right of way in fee. *Rasmussen*, 143 F. Supp. 2d at 1230. Some of the deeds that the Hilchkanums subsequently used to convey the rest of their property explicitly excepted the strip of land belonging to the Railway. The deeds conveyed the surrounding property "less (3) acres right of way of Rail Road." By excepting the right of way in terms of acres of land, the conveyances
betray an understanding that the Railway owned the strip of land and did not merely have a right to enter the strip.

The Rasmussens point out that the Hilchkanums did not mention the railroad right of way in the deed conveying lot 2, which is where most of the strip to which the

Rasmussens lay claim is located. However, this does not bring into dispute the fact that the Hilchkanums intended a fee simple. Had they used other language in conveying lot 2 that recognized the Railway's right of way as only an easement, then a factual finding reconciling the contradictory positions might be necessary.

But the total failure to except the land subject to the right of way in the lot 2 deed is not significantly probative of whether or not the parties intended to convey a fee simple estate. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000) (noting that a scintilla of evidence or evidence that is not significantly probative does not present a genuine issue of material fact).

[6] Finally, the district court properly looked to the circumstances surrounding the execution of the Hilchkanum deed and concluded that they confirmed the parties' intent to convey a fee simple estate. *Rasmussen*, 143 F. Supp. 2d at 1230.

Deeds to the Railway from other landowners executed in the same year as the Hilchkanum deed used the same form but contained additional language explicitly restricting the grant to railroad purposes and providing that the interest would revert to the grantor if the railroad ceased to operate. *See Squire*, 801

City of Seattle, 857 P.2d 283, 286-87 (Wash. Ct. App. 1993).
The differences in these deeds reflected the common practice of the railroads of using fee simple form deeds and adding language to include limitations requested by landowners. *See* Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements From the Nineteenth to the Twenty-First Century*, 27 Ecology L.Q. 351, 378 (2000). The deed in question here suggests that the Hilchkanums requested no such limitations.

[7] In conclusion, "[t]he language of the deed, the behavior of the parties, and the circumstances converge to show the Hilchkanums' intent to convey a fee simple." *Rasmussen*, 143 F. Supp. 2d at 1230-31. The underlying facts are undisputed, and, viewing these facts in the light most favorable to the Rasmussens, as we must on summary judgment, we conclude that King County, as the Railway's successor, possesses a fee simple in the strip of land.**14** We, therefore,

affirm the district court's summary judgment in favor of King County.

V.

Counterclaims

The district court dismissed all of the Rasmussens' counter-

14The Rasmussens argue that the Hilchkanum deed incorrectly describes the boundaries of the right of way on which the railroad tracks lie. This does not alter King County's right to the strip of land in question. According to *DD&L, Inc. v. Burgess*, 51 Wn. App. 329, 753 P.2d 561, 564 (Wash. Ct. App. 1988), "[t]hough the monument referred to in a deed does not actually exist at the time the deed was drafted, but is afterward erected by the parties with the intention that it shall conform to the deed, it will control." The Hilchkanum deed describes the location of the railroad right of way by referring to railroad tracks not yet erected but which were erected with the intention that the location of the tracks would conform to the deed. Thus, the location of the tracks bisecting the Rasmussens' property controls.

claims either for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) or for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). We review these dismissals *de novo*, *see Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) (reviewing 12(b)(6) dismissal *de novo*); *La Reunion Francaise SA v. Barnes*, 247 F.3d 1022, 1024 (9th Cir. 2001) (reviewing 12(b)(1) dismissal *de novo*), and we affirm.

A. Takings

The Rasmussens argue that they are entitled to just compensation for the taking of their land by the government under the state constitution and the Fifth Amendment. *See* Wash. Const., Art. 1, § 16. Their takings claim requires a finding that the Rasmussens own the strip of land. Because King County owns the strip of land in fee simple, the Rasmussens' land was not taken, and they can state no claim for which relief can be granted.

B. Spur Line Arguments

The Rasmussens argue that King County's title to the right of way is invalid because the STB lacked subject matter jurisdiction to order interim trail use over the railroad right

of way. They claim the rail line in question is a spur line over which the STB has no jurisdiction. As the district court wrote, "[b]y challenging the STB proceedings, the Rasmussens are asking the court to reverse an STB order." The courts of appeals have exclusive jurisdiction over any proceeding "to enjoin or suspend, in whole or in part, a rule, regulation, or order of the STB . . . ." 28 U.S.C. § 2321(a); *Dave v. Rails-to-Trails Conservancy*, 79 F.3d 940, 942 (9th Cir. 1996) (finding that district court has no jurisdiction to hear claims that have the practical effect of seeking review of an ICC (now STB) order).

No authority supports the Rasmussens' proposition that, in spite of 28 U.S.C. § 2321, the district court had jurisdiction to

consider the subject matter jurisdiction of the STB. The Rasmussens cite *Powelson v. United States*, 150 F.3d 1103, 1105 (9th Cir. 1998), which holds that a statute may create subject matter jurisdiction yet not waive sovereign immunity. They then argue that, because it is not clear whether Congress has waived sovereign immunity of the STB deliberations, there must be subject matter jurisdiction. This argument has no merit. The

non-waiver of sovereign immunity does not supply subject matter jurisdiction.

The Rasmussens also rely on 28 U.S.C. § 1336(b), which allows a district court to refer a question or issue to the STB and to exercise "exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the STB arising out of such referral." This case involves no such referral, and § 1336(b) does not give the district court any power to refer a question that challenges the STB's jurisdiction to issue an order that it has already issued. The STB implicitly has answered this question by asserting jurisdiction over the rail line; judicial review of the order must be obtained directly from a court of appeals as provided by 28 U.S.C. § 2321(a).

C. First Amendment

The Rasmussens contend that their First Amendment right to petition the government for redress has been violated
because King County refused to communicate with them. In the Rasmussens' Answer and Counterclaim and in their briefing to the district court, the Rasmussens also argued that King County had violated their right to free speech. They argued that a letter from

King County officials threatening to bring criminal harassment charges against Mr. Rasmussen constituted an impermissible prior restraint on his ability to say that "he shall defend his life and his property, and that he shall arm himself." The letter apparently arose after Mr. Rasmussen threatened county employees who entered the railroad right of way bisecting his land. The Rasmussens now focus only on

their right to petition the government for redress of grievances.

Counties are liable for constitutional violations under § 1983 only if the individual officer who committed the violation was acting pursuant to a local policy, practice or custom. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978). The Rasmussens have failed to allege any local policy, practice or custom here. They attempt no response to this argument in their briefing to this court. The First Amendment claim was properly dismissed for failure to state a claim.

D. Second Amendment

John Rasmussen contends that King County violated his Second Amendment right to bear

arms when it obtained an order prohibiting Rasmussen from possessing a gun. This claim must fail for the same reason the First Amendment claim fails — the failure to allege that the violation occurred pursuant to a county custom or practice. *Id.*

E. Fourteenth Amendment Due Process and Eminent Domain

The Rasmussens argue that they have lost their property right in the railroad right of way without due process of law and that their property has been condemned by the government. They also claim that King County owes them compensation for the wrongful exercise of the federal government's power of eminent domain through the STB. These claims presume that the Rasmussens held a reversionary interest in the right of way because the original deed conveyed only an easement. Because we affirm the district court's holding that the original deed conveyed a fee simple, the Rasmussens have no rights in the subject property on which to base a due process or eminent domain claim. The district court properly dismissed these claims.

F. Violations of Local Ordinances

The Rasmussens contend that King County violated various local ordinances in using the railroad right of way. These claims do not appear in the Rasmussens' Answer, Affirmative Defenses and Counterclaims. The Rasmussens never amended their counterclaims to include these new claims. The district court did not consider them. Neither will we.

VI.

CONCLUSION

We affirm summary judgment in favor of King County because there are no genuine issues of fact that disparage King County's claim to a fee simple estate in the strip of land formerly used as a railroad right of way. Further, the district
court properly dismissed the Rasmussens' counterclaims under Federal Rule of Civil Procedure 12(b).

AFFIRMED.

11635 KING COUNTY v. RASMUSSEN

s/Hon. Betty Binns Fletcher, Presiding, Ninth Circuit Judge
s/Hon. Ronald M. Gould, Ninth Circuit Judge

s/Hon. Mary H. Murguia, United States District Court Judge for the District of Arizona, sitting by designation.

Supreme Court, U.S.
FILED

021397 JAN 9 2003

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

John Rasmussen and Nancy Rasmussen, husband and wife, and their marital community,

Petitioners;

v.

King County, a political subdivision of the State of Washington,

Respondent.

On Petition for Writ of Certiorari to the U.S. Ninth Circuit Court of Appeals, and the U.S. District Court, Western District of Washington

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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22 pp

United States District Court
Western District of Washington at Seattle

Dated May 25, 2001, Entered May 29, 2001

KING COUNTY, a political subdivision of the State of Washington,

Plaintiff

v.

JOHN RASMUSSEN and NANCY RASMUSSEN, husband and wife, and their marital community,

Defendants.

No. C00-1637R

ORDER GRANTING IN PART PLAINTIFF'S MOTIONS TO STRIKE, GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND GRANTING PLAINTIFF'S MOTION TO DISMISS

THIS MATTER comes before the court on plaintiff King County's (the "County") motion for summary judgment, motion to dismiss, and motions to strike. Having reviewed the

papers filed in support of and in opposition to these motions, the court rules as follows:

I. BACKGROUND

The dispute centers on ownership of a 100' - wide strip of land that runs along the eastern shore of Lake Sammamish in King County, Washington. Homesteaders Bill Hilchkanum and Mary Hilchkanum claimed the strip and the surrounding land in 1876. They received their final ownership certificate in 1884 and their fee patent in 1888. On May 9, 1887, by deed, the Hilchkanums conveyed an interest in the strip to the Seattle Lake Shore and Eastern Railway Company (the "Railway"). The text of the deed states:

> In Consideration of the benefits and advantages to accrue to us from the location construction and operation of the Seattle Lake Shore and Eastern Railway, in the County of King, in Washington Territory, we do hereby donate, grant and convey unto said Seattle Lake Shore and Eastern Railway Company a right-of-way one hundred (100) feet in width through our land in said County described as follows to wit
>
> Lots one (1) two (2) and three (3) in section six (6) township 24 North of Range six (6) East.

Such right of way strip to be fifty (50) feet in width on each side of the center line of the railway track as located across our said lands by the Engineer of said railway Company which location is described as follows to wit (legal description)

And the said Seattle Lake Shore and Eastern Railway Company shall have the right to go upon the land adjacent to said line for a distance of two hundred (200) feet on each side thereof and cut down all trees dangerous to the operation of said road.

To have and to hold the said premises with the appurtenances unto the said party of the second part and to its successors and assigns forever.

Mary Hilchkanum later conveyed her portion of the homestead property to her husband by quitclaim deed. The conveyance is "less (3) three acres right of way to Rail Road." Bill Hilchkanum then conveyed the property to a third party "less three (3) acres heretofore conveyed to the Seattle International Railway for right of way purposes." Later conveyances of the property included language "excepting" the Railway right of way from the legal descriptions. John Rasmussen and Nancy Rasmussen (the "Rasmussens") currently own

the Hilchkanum property. The right of way strip bisects their land.

The Railway, and its successor Burlington Northern, built a track on the strip of land and used the track regularly for rail service until approximately 1996. In 1997, Burlington Northern sold its railway corridor, including the Hilchkanum strip, to The Land Conservancy of Seattle and King County ("TLC"). TLC petitioned the United States Surface Transportation Board ("STB") to abandon use of the corridor for rail service under the National Trail System Act, 16 U.S.C. paragraph 1247(d) ("Rails-to-Trails Act"). The STB approved interim trail use of the corridor by King County and issued a Notice of Interim Trail Use. The County then purchased the corridor from TLC and obtained title to the right of way carved from the Hilchkanum property.

The Rasmussens have vigorously opposed the County's efforts to railbank the strip and have asserted a fee simple interest in the right of way. As a result, the County brought this action to quiet title and to obtain a declaration of its rights to use the strip. The County received a preliminary injunction in state court against the Rasmussens to prevent interference with County work on the site. The Rasmussens then removed the action to

federal court. The Rasmussens have counterclaimed with allegations that the County violated their First Amendment, Second Amendment, Fifth Amendment and Fourteenth Amendment rights, along with violations of 16 U.S.C. paragraph 1247(d), 42 U.S.C. paragraph 1983, 28 U.S.C. paragraph 1358, and Article 1, Section 16 of the Washington state Constitution. The County brought these motions to dispose of the entire case.

II. ANALYSIS

A. Motion to Strike Briefing and Evidence

1. Overlength Briefs.

Civil Rule 7(c) of the Western District of Washington limits parties to 24 page memoranda unless they obtain prior permission from the court. The Rasmussens submitted a 34-page response to the County's motion for summary judgment and a 32-page response to the County's motion to dismiss. Moreover, a declaration from John Rasmussen accompanies the responses and includes legal argument. The Rasmussens did not request advance permission from the court to file overlength briefs.

The Rasmussen's submissions violate the plain language of Civil Rule 7 (c). The court will strike all briefing of both responses beyond page 24, and the arguments contained in those excess pages will not be considered. In addition, the court will strike all portions of the John Rasmussen declaration and attached exhibits that include legal argument. Specifically, the following portions of John Rasmussen's declaration will not be considered:

(a) Exhibits 1, 9, and 10 to the Rasmussen declaration, which are legal briefs on various issues;
(b) Page 2, line 17 - page 4, line 7 of the declaration, which contain legal argument;
(c) Page 7, line 26 - page 10, line 3 of the declaration, which contain legal argument, and Exhibits 4-7 introduced on those pages;
(d) Page 12, lines 11-15 of the declaration, which contain legal argument;
and
(e) Page 18, line 4 - page 20, line 19 of the declaration, which contain legal argument, and Exhibits 11-14 introduced on those pages.

2. Inadmissible Evidence

"It is well settled that only admissible evidence may be considered by the trial court

in ruling on a motion for summary judgment." Beyene v. Colman Sec. Serv., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988). Evidence that lacks foundation is inadmissible. See Fed. R. Evid. 602 (witness must posses personal knowledge). In paragraph 1 of the response to the motion for summary judgment, the Rasmussens speculate on the intent of Bill Hilchkanum based on his Native American ethnicity. The Rasmussens provide no evidence to support the allegations. Therefore, all but the last two sentences of the paragraph will be stricken.

The Rasmussens also submit a document purportedly created by an unnamed government employee. John Rasmussen attempts to admit this document through his declaration, but he does not have personal knowledge of its authenticity. Fed. R. Evid. 901. As a result, exhibit 3 to the Rasmussen declaration; page 5, lines 4-11 of the Rasmussen declaration; and paragraph 8 of the response to the motion for summary judgment lack foundation and will be stricken.

The County seeks to strike as irrelevant other evidence and arguments about "spur lines" and about the County's behavior in this dispute. Although the evidence's value may be minimal, the court will not strike the

evidence in its entirety. The court will accord the evidence the appropriate weight.

3. Unauthorized Memoranda

Finally, Civil Rule 7(b) provides for an opening brief, a response, and a reply. Nothing in the rule or in Fed. R. Civ. P. 56 authorizes a surreply. The Rasmussens have filed a surreply to the motion to dismiss and have submitted a supplemental declaration from John Rasmussen. The Rasmussens did not request prior permission from the court. Because the court rules do not authorize these submissions, they will be stricken and will not be considered. Cf., e.g., Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996) (new evidence not considered in reply). The County's motions to strike are GRANTED in part.

B. Motion for Summary Judgment

The County has moved for summary judgment on both its causes of action. First, the County seeks to quiet title to the disputed strip of land. Second, the County seeks a declaration that it has the right to use the land without interference.

Summary judgment is appropriate when "there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). There are no material factual disputes in this matter. Although the Rasmussens have raised factual issues regarding the County's behavior and the STB's proceedings, those have little bearing on how the court should interpret the Hilchkanum deed.

1. Quite Title Action

Ownership of the strip of land turns on the deed executed by the Hilchkanums in 1887. The interest they granted to the Railway passes to the County as the Railway's successor in interest. *

(* The Rasmussens argue that the Railway - and therefore the County - received no interest at all, because the Hilchkanums had not received their homestead patent when they executed the deed. To the contrary, federal law specifically authorized unpatented homesteaders to transfer land to railroads for rights of way. See Act of March 3, 1873, c. 266, 17 U.S. Stat. 602; Pierce v. Chicago, M & P.S. Ry. Co., 52 Mont. 110, 156 P. 127, 129-30 (1916). The Rasmussens also state that the County has no claim to the land because the STB improperly authorized railbanking. As explained later, the argument challenges the STB's order, and this Court has

no jurisdiction over such challenges. See 28 U.S.C. paragraphs 2321(a), 2342(5).)

If the Hilchkanums granted a fee interest to the Railway, then the County possesses fee title to the strip. If the Hilchkanums granted only an easement to the Railway, then the County possesses an easement and the Rasmussens own the underlying land.

The intent of the parties is "of paramount importance" when interpreting deeds. Brown v. State, 130 Wn.2nd 430, 924 P.2d 908, 911 (1996). The deed must "clearly indicate" an intent to make the conveyance conditional. King County v. Hanson Inv. Co., 34 Wn2d 112, 208 P.2d 113, 117 (1949); see also Brown, 924 P.2d at 912. *

(* Washington courts presume that a deed in statutory form grants a fee simple. Brown. 924 P.2d at 912. The Hilchkanums deed is not in statutory form, so the presumption does not apply, although clear evidence of conditions still is required.)

Intent analysis requires case-by-case examination of the overall effect of the (1) language of the deed, (2) subsequent behavior of the parties regarding the land, and (3) circumstances at the time of execution. See Brown. 924 P.2d at 912; Scott v. Wallitner,

49, Wn.2d 161, 299 P.2d 204, 204-205 (1956). The three factors interconnect in the Hilchkanum case to depict intent to convey a fee interest.

a. Language of the Deed

"The intent of the parties is to be derived from the entire instrument ...." Harris v. Ski Park Farms, Inc., 120 Wn.2d 727, 844 P.2d 1006, 1012 (1993); see also Brown, 924 P.2d at 913. *

(* Washington courts have found the following overlapping factors helpful in analyzing deed language; (1) whether the deed conveys a strip of land and does not include language regarding the purpose or limiting the conveyance, (2) whether the deed conveys a strip of land and limits use to a specific purpose, (3) whether the deed conveys a right of way over a strip of land rather than a strip of land, (4) whether the deed grants only a right to construct a railway, (5) whether the rights revert to the grantor if the railway ceases operations, (6) whether the stated consideration is nominal or substantial, (7) whether the deed contains a habendum clause limiting use, and other considerations based on language in the deed. See Brown, 912 P.2d at 912.)

The Hilchkanum deed's overall language does not restrict the conveyance by designating a specific purpose, by limiting use of the land, or by adding a reversion clause. The omissions result in an unconditional grant and distinguish the deed from those in which courts have found easements. See Roeder Co. v. Burlington N., Inc., 105 Wn.2d 567, 716 P.2d 855, 859 (1986) ("for all railroad and other right-of-way purposes"); Swan v. O'Leary, 37 Wn.2d 533, 225 P.2d 199 (1950) ("for the purpose of a Railroad right-of-way"); Northlake Marine Works, Inc. v. City of Seattle, 70 Wn. App. 491, 857 P.2d 283, 286-287 (1993) ("to its successors and assigns forever for railway purposes"); King County v. Squire Inv. Co., 59 Wn. App. 888, 801 P.2d 1022, 1023 (1991) ("so long as said land is used as a right-of-way by said railway Company... and this grant is upon the condition that said railway shall be completed over said lands on or before January 1st, 1888"). In contrast to those cases, the open-ended language of the Hilchkanum deed shows intent to convey a fee.

The absence of limitations in the Hilchkanum right of way conveyance is even more striking when contrasted with a different conditional grant in the same deed. The deed grants the Railway the right to "go upon the land adjacent to said line ... and cut down"

dangerous trees. This language specifies a purpose and thus differs significantly from the conveyance at issue.
Thus it is clear that the parties knew how to limit a grant, and that they chose not to limit the right of way.

The Rasmussens ignore the "entire instrument's" unconditional language and instead urge the court to focus on isolated words. For example, they note that the Hilchkanum deed recognizes the Railway will build tracks on the land. However, an acknowledgement of the probable use cannot limit the conveyance unless accompanied by a specific restriction on use - something the Hilchkanum deed lacks. See Scott, 299 P.2d at 205 (fee simple when deed acknowledged that land would be used for railway but did not include any specific limitations); see also Brown, 924 P.2d at 913. Similarly, the Rasmussens claim the deed limits the conveyance by using the term "right of way" in the text and caption, but courts have rejected this narrow view as well. See, e.g., Brown, 208 P.2d at 912, 915 (railroad can obtain a "right of way" as either a fee or an easement); Harris 844 P.2d at 1011-13 (1993) (court found fee simple despite right of way language); Roeder Co. v. K&E Moving & Storage Co., Inc., 102 Wn. App. 49, 4 P.2d 839, 842-43 (2000). *

(* One Washington case did find that a deed containing the term "right of way" without additional limiting language granted an easement rather than a fee. Veach v. Culp, 92 Wn.2d 570, 599 P.2d 526 (1979). Veach, however did not analyze the circumstances surrounding the transfer or the subsequent behavior of the parties. Evidence on both factors exists here and provides context that was lacking in Veach.)

Furthermore, because the Hilchkanums were homesteaders without a final patent, federal law limited them to certain types of conveyances, such as grants to schools, cemeteries, and rights of way to railways. See 17 U.S. Stat. 602. The Act provides more context for the choice of the term "right of way" in the deed, indicating that the Hilchkanums chose the phrase out of necessity rather than a desire to create an easement.

Moreover, other aspects of the language favor a fee simple. The deed grants a "strip" of land described in metes and bounds rather than merely a right "over" the land (as it does with the tree-cutting grant). The deed uses the word "convey" when granting the strip, which is associated with fee transfers (notably, "convey" is absent in the tree-

cutting grant). See Hanson, 208 P.2d at 119. Finding that the overall language contains no restriction, the court concludes that the Hilchkanums intended to convey a fee interest to the Railway.

b. Later Behavior of the Parties

The Hilchkanums' descriptions of the rest of their land in later transfers buttress the intent gleaned from the plain language. After the grant to the Railway, Mary Hilchkanum conveyed her portion of the homestead to her husband. He then conveyed the homestead to a third party. Each deed states that it is "less" the land of the right of way. When parties execute later deeds, they also carve out exceptions for the right of way - as the Hilchkanums did. This is a strong indication that the parties viewed the grant to the Railway to be a fee simple. See Harris, 844 P.2d at 1013 (any other interpretation would render exception "superfluous"); Scott, 299 P.2d at 205.

c. Circumstances Surrounding Execution

Finally, the circumstances surrounding the execution of the deed confirm an intent to convey a fee interest. Deeds from other landowners during the same time period contain different language than the

Hilchkanum deed. The Squire and Northlake deeds are modeled off the same form deed as the Hilchkanums'. Northlake, 857 P.2d at 286-87; Squire, 801 P.2d at 1023. However, both Squire and Northlake contain additional language that specifically restricts the grant to railroad purposes and reverts the interest to the grantor if the railroad ceases to operate. Northlake, 857 P.2d at 286-87; Squire, 801 P.2d at 1023. Nowhere in the Hilchkanums' deed are there any such limitations. See generally Danya C. Wright & Jeffrey M. Hester, Pipes, Wires and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries, 27 Ecology L.Q. 351, 378 (2000) (explaining that railroads used form fee simple deeds and then added language to reflect limitations requested by landowners, which resulted in railroads possessing a variety of fee and easement interests along the same tracks).

The language of the deed, the behavior of the parties, and the circumstances converge to show the Hilchkanums' intent to convey a fee simple. Even construing the facts in the light most favorable to the Rasmussens, only isolated words support their argument, and the evidence does not "clearly indicate" an intent to condition the conveyance. The

County, as the Railway's successor, possesses a fee simple in the strip of land. *

(*The Rasmussens submitted evidence that the deed incorrectly describes the boundaries of the right of way. This does not alter the County's rights, because the location of the actual tracks controls. See DD&L, Inc. v. Burgess, 51 Wn. App. 329, 753 P.2d 561, 564 (1988).)

The County's motion for summary judgment is GRANTED, and title is quieted in the County's favor.

2. Declaratory Relief

Because the County posses a fee simple in the strip of land, it has the right to access the property without interference from the Rasmussens. The County motion for summary judgment on its second clause of action is GRANTED.

C. Motion to Dismiss

The County has moved to dismiss all the Rasmussens' counterclaims for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12 (b) (1), 12 (b) (6). Dismissal for failure to state a claim is appropriate if, based

on the complaint and attachments, the party can prove no set of facts in support of the claim which would entitle him to relief. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir. 1997). Counterclaims (a), (d), (f), and (g) rely on finding that the Rasmussens own the strip of land. Because the court has quieted title in the County, the Rasmussens have no rights to the strip of land and none of the counterclaims state a claim for which relief can be granted.

The Rasmussens attempt to overcome this conclusion by arguing that the County's title is invalid, because the STB order that authorized railbanking was allegedly invalid. By challenging the STB proceedings, the Rasmussens are asking the court to reverse an STB order. See Dave v. Rails-to-Trails Conservancy, 79 F.3d 940, 942 (9th Cir. 1996) (court looks at whether practical effect of cause of action requires review of order); Grantwood Village v. Missouri Pac. R.R. Co., 95 F.3d 654, 657 (8th Cir. 1996) (challenge to property transfer required review of order). The courts of appeals have exclusive jurisdiction over any proceeding "to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Surface Transportation Board ... ." 28 U.S.C. paragraph 2321 (a); see also Dave, 79 F.3d at 942; Glosemeyer v. Missouri-Kansas-Texas

R.R., 879 F.2d 316, 320 (8th cir. 1989); Louisiana-Pacific Corp. v. Texas Dep't of Transp., 43 F.Supp.2d 708, 711 (E.D. Tex. 1999). Thus, this court lacks subject matter jurisdiction to consider the Rasmussens' argument, and the Rasmussens fail to state a claim for which relief can be granted. The County's motion to dismiss counterclaims for violations of 16 U.S.C. paragraph 1358, and the Washington State Constitution, Article 1, Section 16 will be GRANTED.

Counterclaims (b) and (c), for violation of the first Amendment and Second Amendment, do not explicitly rely on the Rasmussens' ownership of the land.*

(* The Rasmussens failed to include an allegation that the County violated 42 U.S.C. paragraph 1983 in either counterclaim (b) or (c). Instead, they stated the allegation as a separate counterclaim. The Rasmussens have acknowledged in their briefing that the Section 1983 allegation was intended to be incorporated into the other causes of action rather than stand alone. Therefore, the court will incorporate 42 U.S.C. paragraph 1983 into counterclaims (b) and (c) and counterclaim (e), which contained the misplaced Section 1983 allegation, will be DISMISSED.)

However, both causes of action still fail to state a claim for which relief may be granted. A cause of action against a county for constitutional violations requires both allegations of unconstitutional behavior and allegations that the conduct resulted from an official policy, practice, or custom. See Leatherman v. Tarrant County, 570 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); Gibson v. United States, 781 F.2d 1334, 1337-38 (9th Cir. 1986). The Rasmussens' counterclaims do not allege any specific behavior by the County that violated their rights. Moreover, the Rasmussens do not allege any policies, customs, or practices that violated their rights. In their briefing, but not in the counterclaims, the Rasmussens quote numerous county ordinances. They do not allege that any of these ordinances violated their rights, nor do they explain any actions County employees took to enforce the ordinances that somehow violated the Rasmussens' rights. The Rasmussens have failed to plead any facts to support the basic elements of their causes of action and have therefore failed to state a claim. The County's motion to dismiss counterclaims (b) and (c) for violations of the First Amendment and Second Amendment will be GRANTED. *

(*The Rasmussens request discovery, mediation, a stay of proceedings, and oral

argument. None of these are necessary in light of the court's rulings, and the requests will be DENIED.)

III. CONCLUSION

The court GRANTS plaintiff's motions to strike in part. The court GRANTS plaintiff's motion for summary judgment. The court quiets title in the County's favor and declares that the County has the right to quiet enjoyment of its property without interference by the defendants. The court GRANTS plaintiff's motion to dismiss all counterclaims.

DATED at Seattle, Washington this 25th day of May, 2001.

Signed by
Barbara Jacobs Rothstein
United States District Judge

Supreme Court, U.S.
FILED
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(3)

No. 02-1397

In the Supreme Court of the United States

JOHN RASMUSSEN, ET UX.,
Petitioners,

v.

KING COUNTY, WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS

1. Act of March 3, 1873, ch. 266, 17 Stat. 602 (1873).

> Any person who has already settled or hereafter may settle on the public lands, either by pre-emption, or by virtue of the homestead law or any amendments thereto, shall have the right to transfer, by warranty against his own acts, any portion of his pre-emption or homestead for church, cemetery, or school purposes, or for the right of way of railroads across such pre-emption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to their pre-emption or homestead.
>
> Codified at Sec. 2288, Revised Statutes of the United States (1878).

2. 16 U.S.C. 1247(d). Interim use of railroad rights-of-way.

> The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 801 et seq.), shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future

reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes...

3. RCW 64.04.050. Quitclaim deed – Form and effect.

Quitclaim deeds may be in substance in the following form: The grantor (here insert the name or names and place of residence), for and in consideration of (here insert consideration) conveys and quitclaims to (here insert grantee's name or names) all interest in the following described real estate (here insert description), situated in the county of ...., state of Washington....

4. 28 U.S.C. §2344. Review of orders; time; notice; contents of petition; service.

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue

lies. The action shall be against the United States...

STATEMENT OF THE CASE

1. DISTRICT COURT'S JURISDICTION.

As the Ninth Circuit found, the District Court's jurisdiction over this matter was pursuant to 28 U.S.C. § 1331 (federal question). Petition App. at 9. The Ninth Circuit correctly applied the well-pleaded complaint rule. Id. (citing Patenaude v. Equitable Life Assurance Soc'y of United States, 290 F.3d 1020, 1023 (9th Cir. 2002)).[1] In its Complaint, King County pled, in the alternative, that it had a legal right to "maintain, use, enjoy and develop the subject property" as a recreation trail even if the County's predecessors only acquired an easement for use of the subject property for railroad purposes. The source of this legal right is 16 U.S.C. §1247(d), the Rails to Trails Act.

2. FACTS

Bill Hilchkanum filed a homestead application on June 28, 1876 under the Homestead Act of 1862. After making final proof, Mr. Hilchkanum was issued a Final Certificate on March 29, 1884, by the Register of the Land Office at Olympia, Washington Territory. A patent was issued to Mr. Hilchkanum on July 24, 1888.

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[1] Petitioners argue that the district court lost its jurisdiction when it dismissed Petitioners' counterclaims. Petition at 2. However, the court's jurisdiction must be based on the contents of the Complaint, not Petitioners' counterclaims.

By deed dated May 9, 1887, Bill Hilchkanum and his wife ("Hilchkanums") conveyed to the Seattle Lake Shore and Eastern Railway Company (the "Railway"), a portion of the land the Hilchkanums obtained under the Homestead Act. The property conveyed to the Railway consisted of a continuous, 100'- wide strip of land, over one mile long, running along the eastern shore of Lake Sammamish in King County, Washington. The 100'- wide strip of land bisects what was Petitioners' residential property.[2] The subject of this litigation is the portion of this strip of land to which Petitioners' property is adjacent ("subject property"). The strip of land conveyed by Hilchkanum to the Railway is just one segment of the East Lake Sammamish rail corridor ("the corridor" or "the ELS corridor") which runs approximately 11 miles along the shore of Lake Sammamish.

In early 1997, the Burlington Northern and Santa Fe Railway, successor in interest to the Railway, sold the entire ELS corridor, including the subject property, to a non-profit organization, The Land Conservancy of Seattle and King County ("TLC").

On June 11, 1997, TLC petitioned the United States Surface Transportation Board ("STB") to abandon use of the ELS corridor for rail service. On September 16, 1998, as authorized by 16 U.S.C. § 1247(d), the STB approved interim trail use (a.k.a. "railbanking") of the ELS corridor by King County and issued a Notice of Interim Trail Use ("NITU"). Shortly after the NITU was issued, King County then entered into an agreement with TLC to purchase approximately 11 miles of the ELS corridor, including the subject property. By

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[2] Petitioners transferred title to this residential property to a third-party by deed dated August 21, 2002 and recorded September 5, 2002.

virtue of its purchase of the ELS corridor, King County has become the successor in interest to the Railway, and holds title to the subject property in fee simple.

In answer to a quiet title action filed by King County in state court, Petitioner challenged King County's ownership of the property and removed the matter to federal district court. The District Court held - and the Ninth Circuit Court of Appeals affirmed - that King County owns the subject property in fee simple. In their Question Presented, Petitioners seek review of the Ninth Circuit's decision by alleging, *inter alia*, that the court created new federal law and, in doing so, superseded established state law. As the following will establish, Petitioners' Question Presented does not accurately reflect the Ninth Circuit's decision and other claims by Petitioners are wholly without merit.

REASONS FOR DENYING WRIT

1. THE DECISION BELOW IS CONSISTENT WITH FEDERAL AND STATE LAW REGARDING TRANSFER OF LEGAL TITLE TO THE LANDS AT ISSUE.

A. The land transferred to Hilchkanum by the federal government was not "non-federal land".

Petitioners' Question Presented is premised in part on an inaccurate presumption that the land at issue was "exclusively non-federal land". Petition at 1 (emphasis added). At all times prior to Hilchkanum taking title, the land in question was federal land. As evidenced by the issuance of the final certificate and, subsequently, the patent, the land was part of the public domain prior to Hilchkanum's

entry. As discussed further below, because the land was in the public domain, federal law determines the validity of the transfer of the land prior to issuance of the patent. Furthermore, whether the Act of March 3, 1873, ch. 266, 17 Stat. 602 (1873)[3], dictates the nature of the interest granted by the Hilchkanums to the Railway is an issue only because the land in question had been federal land. The statement that the land was "non-federal" is only one of several false premises from which Petitioners proceed.

B. Ninth Circuit applied the correct legal rules in deciding whether the Hilchkanum could convey fee simple title to the Railway prior to issuance of the patent.

The Ninth Circuit applied the correct law in reviewing the transfer of the federal land to Hilchkanum and determining that the Hilchkanums could transfer a fee simple interest in those lands to the Railway prior to the issuance of the patent. Federal law determines what constitutes a transfer of land out of the public domain. Wilcox v. Jackson, 38 U.S. 498, 516-17 (Mem), 13 Pet. 498, 10 L.Ed. 264 (1839). The Court in Wilcox held:

> ...whenever the question in any Court, state or federal, is, whether a title to land which has once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other

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[3] Codified at § 2288, Revised Statutes of the United States (1878)and hereinafter referred to as "Section 2288".

> property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

Id. See also, McCune v. Essig, 199 U.S. 382, 389-90, 26 S.Ct. 78, 50 L.Ed. 237(1905)(citing Wilcox). According to long-standing principles of federal law, the vesting of the right to a patent in an individual is equivalent to the individual obtaining title. See, e.g., U.S. v. Detroit Timber & Lumber Co., 200 U.S. 321, 334-35, 26 S.Ct. 282, 50 L.Ed. 499 (1906). The issuance of the patent at that point is merely a ministerial act. Id. at 335-36; and Simmons v. Wagner, 101 U.S. 260 (Mem), 261, 11 Otto 260, 25 L.Ed. 910 (1879). Additionally, the effective date of the patent relates back to the date the right to the patent vested. Detroit Timber at 334-35. Therefore, the Ninth Circuit did not "create" new federal law, it merely followed well-established rules of federal law. Furthermore, in applying these rules, the Ninth Circuit did not "supersede" state law since federal law - not state law - governs the issue of whether the Hilchkanums could grant a fee simple interest in the subject property prior to issuance of the patent, i.e. whether title passed to the Hilchkanums prior to issuance of the patent.

According to federal law, the Hilchkanums' right to the property at issue vested upon presenting final proof of a valid homestead claim as documented by the issuance of the final certificate. See Petition App. at 13. At that time, they held title to the property against all claims other than by the federal government. Once the patent was issued, title was considered transferred to Hilchkanum effective the date of the final certificate. Since the individual effectively holds title against all others, the individual may alienate all or a portion

of his or her interest the property without affecting his or her right to the patent. In Detroit Timber, the Court left in place timber contracts entered into by defendant prior to issuance of a patent to defendant. Id., 200 U.S. 321. In Cornelius v. Kessel, the Court quieted title in the heirs of an individual to whom property was conveyed after entry by the grantor but prior to the issuance of a patent. Id., 128 U.S. 456, 9 S.Ct. 122, 32 L.Ed. 482 (1888). In fact, once the right to a patent vests, state law, not federal law, governs such conveyances. Id. at 338. See also, Ruth v. U.S., 37 Fed.Cl. 677, 684 (1997). Therefore, under federal law, the holder of the right has equitable title and the authority to convey property prior to the issuance of the patent.

Since the entryman obtains equitable title upon issuance of the final certificate, it follows then that the Ninth Circuit correctly determined that Section 2288 does not restrict the type of transfers that could be made after final proof has been accepted. Not only does the individual obtain equitable title at that time, there also is no requirement that any subsequent transfers be reported after final proof. The purpose of Section 2288 is to identify transfers that would not "vitiate the right to complete and perfect the title to...homesteads." Since title is perfected at the time of final proof, Section 2288 has no application after the final certificate was issued. Hilchkanum had the right to transfer any interest to the property upon receipt of the final certificate. That right was further solidified into a legal right by the issuance of the patent.

C. No Need to Apply State Rules Regarding After-Acquired Property.

Petitioners imply that according to the state conveyance statute, RCW 64.04.010, a patent was required

in order to effectuate the transfer from the federal government to Hilchkanum. Petition at 15-16. Petitioners also assert that state law regarding after-acquired property would apply since the patent was issued after the deed to the Railway was executed.[4] Id. at 16-17. However, given that federal law governs the transfer of federal property and, pursuant to federal law, Hilchkanum obtained equitable title to the property at the time of the final certificate, there was no need for the Ninth Circuit to consider the state law regarding either the form of the conveyance from the federal government or after-acquired property.[5] Of course, the conveyance from the Hilchkanums to the Railway would be subject to state law, i.e. a deed was required. The Hilchkanums complied with this requirement in transferring the fee simple interest in the subject property to the Railway.

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[4] Petitioners assert that the deed at issue is a "quitclaim deed". Petition at 17. However, the deed is not in the statutory form of a quitclaim deed. RCW 64.04.050. The deed does not use the term "quitclaims". Instead, the Hilchkanum deed uses the words "...donate grant and convey.."

[5] Petitioners' arguments in this area are inconsistent because they allow that Hilchkanum, pursuant to Section 2288, could have conveyed a railroad right of way prior to the patent issuing without violating state law. Petition at 17. Yet, they argue that conveying other property prior to the patent issuing would have been a violation of state law. Perhaps Petitioners are implying that the former is allowed since a federal statute authorizes the conveyance. Given that federal law also allows the latter, this would be a difference without a distinction.

D. Court Properly Applied State Law in Interpreting Hilchkanum Deed to Railway.

Both courts carefully applied the relevant state law in determining the nature of the transfer of the strip of land from the Hilchkanums to the Railway. In doing so, neither the Ninth Circuit nor the district court created federal rules in reaching their conclusions. Furthermore, each court had jurisdiction to render a decision regarding the nature of the interest conveyed since the federal question involved was integral to the primary lawsuit. Before deciding whether 16 U.S.C. § 1247(d) prevented the interest granted by the deed from being extinguished, the courts needed to determine what interest was granted.[6] In ruling on the issue, the courts were exercising their direct jurisdiction, not their pendent jurisdiction as alleged by Petitioner. Petition at 2.

In rendering its decision, the Ninth Circuit followed the rules laid out in Brown v. State, 130 Wn.2d 430, 924 P.2d 908 (1996), and other state court decisions interpreting deeds to railroad companies. Brown is the latest pronouncement of the Washington Supreme Court on the subject. The Ninth Circuit reviewed and discussed every case cited by Petitioners, including an extensive treatment of Brown. Compare Petition at 20 with Petition App. at 15-30. The Ninth Circuit and the district court both applied the rule enunciated in Brown that a deed by deed analysis be undertaken considering the words within the deed as well as the surrounding circumstances and the subsequent conduct of

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[6] Petitioners also reinforced the jurisdiction of the federal courts regarding the interpretation of the deed by raising the issue of the application of Section 2288 and, thus, intertwining a federal issue in the determination of the nature of Hilchkanum's grant.

the parties. Brown 130 Wn.2d at 440. Petitioners offer opinions by "experts" to assail the court's application of the state law. Petition at 8-10. However, these opinions are merely the conclusions of individuals developed by applying their interpretation of the relevant law to the undisputed facts. Since applying law to undisputed facts is solely the role of courts, these opinions cannot call the Ninth Circuit's and the district court's well-reasoned decisions into question.

Petitioner also raises the issue of Hilchkanum's illiteracy, but that issue was addressed by the Ninth Circuit. Petition App. at 26-27 (note 13). The Court assumed that Hilchkanum received similar assistance in executing the deed as he had in navigating the Homestead claim process. Id. [7] Any inference to the contrary would not be reasonable.

E. No Departure From the Usual Course of Judicial Proceedings.

As the foregoing indicates, the decisions of the Ninth Circuit and the district court carefully applied the relevant law to the facts contained in the record. The decision in no way conflicts directly or indirectly with prior decisions or statutory provisions of either federal or state law. In addition, Petitioners do not place in question the courts' decisions to issue a summary judgement. Petitioners fail to point to any genuine issues of material fact or any reasonable inferences that should have been drawn in their favor that would change the outcome. The material facts, e.g., the content of the various deeds, considered by the courts are not in dispute and

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[7] Petitioner refers to RCW 64.20.020 which required court approval of deeds from Native Americans. Petition at 19. However, this statue was not adopted until 1890 and, therefore, is irrelevant to this matter.

other historical evidence raised by Petitioners is uncontroverted because it is not probative. Therefore, there is no reason this Court should disturb the Ninth Circuit's decision in this matter and Petitioner's application for a Writ of Certiorari should be denied.

2. OTHER ISSUES RAISED ARE IRRELEVANT TO QUESTION PRESENTED AND ARE SIMPLY WITHOUT MERIT.

A. Not Appropriate to Examine Other Deeds.

Petitioners suggest that this matter be remanded back to a trial court so that "all Native American-grantor, railroad-grantee deeds of the late 1800's, including Hilchkanum's deed" can be examined. Petition at 18. Obviously, such review would be unnecessary as well as incomplete. If other deeds are to be considered in determining the intent of the parties to the Hilchkanum deed, all deeds – whether by Native Americans or by grantors of other ethnicity – should be included in the review in order to present the court with a comprehensive picture of the surrounding circumstances. However, such a survey is unnecessary. Review of the wording of the deed to the Railway and other deeds granted by the Hilchkanums as well as deeds interpreted in prior reported decisions is sufficient to determine the intent of the parties to the deed at issue.

B. The District Court did not Have Jurisdiction to Consider the Spur Line Issue or Any Other Challenge to the STB Decision.

As the Ninth Circuit found, Petitioners' "spur line" argument and all other allegation of irregularities in the STB proceedings boil down to a challenge to the legality of the STB's decision to authorize railbanking of the subject property. See Grantwood Village v. Missouri Pacific R.R. Co., 95 F.3d 654, 657 (8th Cir. 1996)(challenge to transfer of property pursuant to the Trails Act is collateral attack on [STB] ruling). Pursuant to 28 U.S.C. §§ 2321(a) and 2342(5) (Hobbs Act), the federal court of appeals has exclusive jurisdiction over challenges to STB decisions. Id. See also, Dave v. Rails-to-Trails Conservancy, 79 F.3d 940, 942 (9th Cir. 1996)(practical effect of a taking claim is to seek review of the [STB's] order); Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316, 320 (8th Cir. 1989); and Lousiana-Pacific Corp. v. Texas Dept. of Transp., 43 F.Supp.2d 708, 711 (E.D.Tex. 1999).

A challenger of an STB order must file a petition for review in the federal court of appeals within 60 days following entry of a final STB order. 28 U.S.C.A. § 2344. Once the statutory 60-day period for seeking review of a final agency order has passed, the agency order is no longer subject to judicial review. Friends of the Atglen-Susquehanna Trail, Inc. v. STB, 252 F.3d 246 (3d Cir. 2001). The 60-day time limit is jurisdictional, and cannot be judicially altered or expanded. California Ass'n of the Physically Handicapped, Inc. v. FCC, 833 F.2d 1333 (9th Cir. 1987); Texas v. US, 749 F.2d 1144 (5th Cir. 1985), reh. denied 756 F.2d 882, cert. denied 105 S.Ct. 3513, 472 U.S. 1032, 87 L.Ed.2d 642; Chem-Haulers, Inc. v. U.S., 536 F.2d 610 (5th Cir. 1976).

Petitioners did not challenge the STB's decision in this matter. As a result the decision became res judicata for the purposes of these proceedings 60 days after it was issued and proper notice given.[8] Petitioners' opportunity to challenge subject matter jurisdiction has long since passed.

C. Ninth Circuit Properly Refused to Consider Ordinances Cited by Petitioners.

As the Ninth Circuit pointed out, Petitioners failed to amend their Answer or Counterclaims in order to assert a claim that any deprivations of their rights were the result of a County custom or practice. Petition App. at 35-36. Therefore, any arguments that the Ninth Circuit's dismissal of Petitioner's § 1983 claims was improper are unsupported by the record.[9]

CONCLUSION

The Ninth Circuit and the District Court did not create law in deciding the issues before them. They both applied the correct, existing rules of law to the relevant, undisputed facts. Their conclusions derived therefrom do not constitute a departure from the accepted and usual course of judicial proceedings. Petitioners offer no credible basis for reviewing

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[8] Petitioners claim they should have been given actual notice of the STB proceedings, but offer no basis for that claim. Petition at 11.

[9] Also, Petitioners' allegation that the County based its petition for an injunction on false statements would not be borne out by a review of the record before the district court. See Petition at 10.

the Ninth Circuit's decision and, therefore, their Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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